STATE OF MICHIGAN

COURT OF APPEALS

ROBERT DAVIS,

Plaintiff-Appellant,

v

HIGHLAND PARK BOARD OF EDUCATION and HIGHLAND PARK SCHOOL DISTRICT EMERGENCY FINANCIAL MANAGER,

Defendants-Appellees.

UNPUBLISHED
July 24, 2014

Nos. 315002 and 316235
Wayne Circuit Court
LC No. 12-013301-AW

ROBERT DAVIS,

Plaintiff/Appellant-Cross-Appellee,

v

HIGHLAND PARK BOARD OF EDUCATION,

Defendant-Appellee,

and

HIGHLAND PARK SCHOOL DISTRICT EMERGENCY FINANCIAL MANAGER,

Defendant/Appellee-Cross-Appellant.

No. 315511
Wayne Circuit Court
LC No. 12-013301-AW

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff appeals as of right from the trial court's orders awarding attorney fees and costs, claiming that the trial court erred in finding that his action was frivolous and in amending its orders without jurisdiction. Defendant Highland Park School District Emergency Financial Manager ("EFM") filed a claim of cross-appeal from the trial court's order awarding attorney fees, claiming that the trial court erred in awarding attorney fees

and costs against plaintiff only, instead of plaintiff and his attorney. For the reasons explained below, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

On October 9, 2012, plaintiff, as Secretary of defendant Highland Park Board of Education (the "Board"), brought a claim against the Board and the school district's EFM, seeking declaratory relief and a writ of mandamus. Specifically, plaintiff requested that the trial court issue writs of mandamus compelling the Board to hold regular meetings pursuant to MCL 380.11a(6) and compelling the EFM to hire a superintendent of schools pursuant to MCL 380.1229. Plaintiff also requested issuance of a declaratory judgment stating that the Board had jurisdiction over all academic affairs and that the EFM had a duty to provide the Board with a building at which regular board meetings could be held. Plaintiff coupled his complaint with an emergency motion and a motion for temporary restraining order, which the trial court denied. The trial court concluded that plaintiff lacked standing to seek a declaratory judgment and a writ of mandamus, and that plaintiff had no likelihood of success on the merits of his claim. On December 14, 2012, the trial court issued its order dismissing plaintiff's complaint with prejudice for the reasons stated on the record.

On February 14, 2013, following a hearing on defendants' motions for attorney fees, the trial court issued an order granting defendants' motions on the basis that plaintiff's claims were frivolous. More specifically, the court concluded that plaintiff's claims were devoid of arguable legal merit and that his primary purpose in filing suit was to harass defendants. In its opinion, the trial court stated that plaintiff lacked standing to bring his claims, that he should have brought a quo warranto proceeding, that he had previously filed 22 lawsuits against the Board, including an unsuccessful quo warranto proceeding, and that he failed to post a mandatory $1,000 bond before filing the present action. The trial court also found that plaintiff did not contest the hourly rates charged by defendants' counsel, and that plaintiff did not present sufficient evidence to challenge the reasonableness or necessity of the fees and costs incurred. The court awarded the EFM attorney fees in the amount of $31,566.50, and it awarded attorney fees to the Board in the amount of $8,383.

Thereafter, defendants requested entry of a proposed judgment awarding attorney fees, which stated that plaintiff's complaint was dismissed with prejudice pursuant to the trial court's December 14, 2012 order, and that it was final order that resolved the last pending claim and closed the case. The proposed judgment noted that the EFM during the pendency of the proceedings had been replaced by a new EFM, and that the award of attorney fees and costs was against both plaintiff and his attorney. The proposed judgment provided that plaintiff would pay the EFM attorney fees in the amount of $31,566.50 plus costs in the amount of $372.10, and for the bond to be released to the EFM in partial satisfaction of the judgment. The proposed judgment further provided for plaintiff to pay the Board attorney fees in the amount of $8,383 plus costs in the amount of $35.

On February 27, 2013, plaintiff filed a claim of appeal from the trial court's February 14, 2013 order. The next day, plaintiff filed an objection in the trial court to defendants' proposed judgment, arguing that its claim of appeal in this Court divested the trial court of jurisdiction and that the proposed judgment impermissibly added plaintiff's counsel as a liable party. On March

1, 2013, the EFM filed a motion for entry of judgment and attorney fees, and the trial court held a hearing on March 8, 2013.

At the hearing, the EFM's attorney stated that he was requesting a final judgment stating that it resolves the last pending claim and closes the case, and the trial court responded, "I know that. I missed that in my opinion. And usually I put that at the end and I didn't." The trial court stated that it still had jurisdiction to enter a judgment because it had authority to correct any defect until the record was filed with the Court of Appeals. The trial court further held that it did not want attorney fees awarded against plaintiff's counsel, and that such provisions in the proposed order would be stricken. The trial court thereafter entered the proposed judgment on March 8, 2013, after manually striking the provisions rendering plaintiff's attorney liable for attorney fees and costs. The trial court's March 8, 2013 judgment stated that it was a final order resolving the last pending claim and closing the case.

On March 22, 2013, the EFM requested entry of an amended judgment, which altered the trial court's March 8, 2013 judgment by deleting the language that was manually stricken. The attorney fee and cost awards remained the same. On March 28, 2013, plaintiff filed an objection to the amended judgment, and on March 29, 2013, he filed a claim of appeal from the March 8, 2013 judgment. The EFM filed a cross-appeal from the same order, to which plaintiff did not respond. On April 19, 2013, the trial court entered the amended judgment, after manually striking the language stating that it was a final order resolving the last pending claim and closing the case. Plaintiff thereafter filed a claim of appeal from the April 19, 2013 amended judgment.

Plaintiff first argues that the trial court erred in awarding attorney fees on the basis that his action was frivolous. We review a trial court's finding that a claim was frivolous for clear error. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). "A trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*.

MCL 600.2591(1) provides:

> Upon motion of any party, if a court finds that a civil action . . . was frivolous, the court that conducts the civil action *shall* award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney. [Emphasis added.]

Pursuant to MCL 600.2591(3)(a):

> "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

Here, the trial court found that plaintiff's action was frivolous because it concluded that his primary purpose was to harass defendants and because his legal positions were devoid of legal merit. On appeal, plaintiff does not argue that the trial court erred in ruling that his primary purpose was to harass under MCL 600.2591(3)(a)(*i*). In fact, plaintiff ignores this aspect of the trial court's ruling altogether. Accordingly, because MCL 600.2591(3)(a) states that "frivolous" means "at least 1" of the conditions set forth in subsections (3)(a)(*i*)-(*iii*), plaintiff has failed to show that the trial court erred in finding that his action was frivolous under MCL 600.2591(3)(a).

Moreover, plaintiff has failed to demonstrate that the trial court clearly erred in finding that his action was devoid of arguable legal merit. In his brief on appeal, plaintiff argues that the trial court erred in finding that his action was frivolous because: (1) his action ultimately led to the Board conducting meetings as he requested in his complaint; (2) an absence of standing and the trial court's disagreement with his legal analysis "cannot" provide a basis to award attorney fees and costs; and (3) the trial court erred in stating that he should have pursued a quo warranto proceeding because he "was not seeking to challenge or try title to any public office held by" defendants. Plaintiff, however, fails to expand on any of these assertions and does not support any of his assertions with legal authority. Accordingly, we need not consider this issue. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Next, plaintiff argues that reversal is warranted because the attorney fees awarded to defendants were not reasonable.[1] An award of attorney fees and costs is reviewed for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

Our Supreme Court has noted that the factors to be considered in determining the reasonableness of attorney fees include "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Id*. at 529 (citations omitted).

Plaintiff asserts that defendants' attorney fees were unreasonable and inaccurate, but plaintiff offers no explanation supporting these assertions and does not address any of above-mentioned factors. Plaintiff does not object to the rates charged by defendants' attorneys, nor does he identify any specific services that should have been performed in less time or by an attorney with less experience. Moreover, plaintiff ignores the trial court's conclusions that he did not challenge the hourly rates of defendants' attorneys, and that the EFM's attorney testified that the case presented "several complex situations" regarding the EFM's authority, which required "extensive legal and factual investigation." Because plaintiff's argument is devoid of explanation, detail, and citation to legal authority, this issue is not properly before this Court and it need not be considered. *Wilson*, 457 Mich at 243.

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[1] We note that plaintiff failed to identify this issue in his statement of questions presented. MCR 7.212(C)(5). Ordinarily, no issue will be considered that is not set forth in the statement of questions presented. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

Next, plaintiff argues that the trial court lacked subject-matter jurisdiction to enter its March 8 and April 19, 2013 judgments once plaintiff filed a claim of appeal in this Court. "Whether a court has subject-matter jurisdiction is a question of law subject to review de novo." *Davis v Dep't of Corrections*, 251 Mich App 372, 374; 651 NW2d 486 (2002). Similarly, "[t]he interpretation and application of court rules present questions of law to be reviewed de novo using the principles of statutory interpretation." *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012).

The goal in interpreting court rules is to "gives effect to the rule maker's intent as expressed in the court rule's terms, giving the words of the rule their plain and ordinary meaning. If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written." *Peterson v Fertel*, 283 Mich App 232, 235-236; 770 NW2d 47 (2009) (citations and internal quotation marks omitted). But "[i]f judicial construction is required, this Court must adopt a construction that best accomplishes the purpose of the court rule. While the Court may consider a variety of factors, it should always use common sense." *Vyletel-Rivard v Rivard*, 286 Mich App 13, 22; 777 NW2d 722 (2009) (citations omitted).

Under MCR 7.208(A):

> After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except
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> (1) by order of the Court of Appeals,
>
> (2) by stipulation of the parties,
>
> (3) after a decision on the merits in an action in which a preliminary injunction was granted, or
>
> (4) as otherwise provided by law. . . .

MCR 7.208(C) allows for the correction of defects by the trial court:

> Except as otherwise provided by rule and until the record is filed in the Court of Appeals, the trial court or tribunal has jurisdiction
>
> (1) to grant further time to do, properly perform, or correct any act in the trial court or tribunal in connection with the appeal that was omitted or insufficiently done, other than to extend the time for filing a claim of appeal or for paying the entry fee or to allow delayed appeal;
>
> (2) to correct any part of the record to be transmitted to the Court of Appeals, but only after notice to the parties and an opportunity for a hearing on the proposed correction.

Further, "[t]he trial court retains authority over stay and bond matters, except as the Court of Appeals otherwise orders," MCR 7.208(F), and "[t]he trial court may rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals orders otherwise," MCR 7.208(I).

Plaintiff argues that the trial court's February 14, 2013 order awarding attorney fees was a final order under MCR 7.202(6)(a) because it disposed of all of its claims and awarded attorney fees. Under MCR 7.202(6)(a), a final order in a civil case includes "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order," and "a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule." MCR 7.202(6)(a)(i), (iv). Defendants argue that the February 14, 2013 order was not a final order because it did not state, as required by MCR 2.602(A)(3), that it "resolve[d] the last pending claim and close[d] the case." MCR 7.202(6)(a) defines the meaning of a final order, and MCR 2.602(A)(3) merely imposes a requirement for entry of a final order. We hold that the February 14, 2013 order granting defendants' motion for attorney fees and costs was a final order under the plain language of MCR 7.202(6)(a)(iv) because it followed the trial court's December 14, 2012 order dismissing plaintiff's complaint with prejudice and awarded attorney fees. Moreover, MCR 7.202(6)(a) does not define a final order as one certified as a final order under MCR 2.602(A)(3). Finally, the trial court's failure to include the statement that the order resolved the last pending claim and closed the case pursuant to MCR 7.202(6)(a) is more akin to a defect that could be corrected pursuant to MCR 7.208(C).

While we agree that the February 14, 2013 order was a final order, we disagree with plaintiff's argument that the trial court lacked jurisdiction to enter its March 8 and April 19, 2013 judgments. In its March 8, 2013 judgment, the trial court awarded attorney fees as it did in its February 14, 2013 order, but it also (1) ordered that plaintiff's $1,000 bond be released in satisfaction of the judgment, (2) awarded costs to each defendant, and (3) substituted the EFM who replaced the EFM whose actions were the subject of the claims brought as the recipient of attorney fees and costs. As noted, the trial court retained authority over "bond matters" under MCR 7.208(F), and also retained authority over "requests for costs" under MCR 7.208(I). Further, substituting the successor EFM as the recipient of attorney fees constituted a correction that the trial court was permitted to make under MCR 7.208(C), and there is no dispute that it was made before the record was filed on appeal. Accordingly, we conclude that the trial court did not amend the substance of the February 14, 2013 order, and that it instead made orders regarding additional matters and corrections for which it had jurisdiction under the plain language of MCR 7.208(C), (F), and (I).

Further, we conclude that the trial court's April 19, 2013 amended judgment did not change the attorney fees or costs awarded under the February 14, 2013 order or the March 8, 2013 judgment, as it merely removed language in the March 8, 2013 judgment that the trial court had already manually stricken. Once more, the trial court retained authority to correct defects in the record, which would include the deletion of manual strikes contained in an order, and there is no dispute that this correction was made before the record was filed with this Court. MCR 7.208(C). Accordingly, the trial court was not without subject-matter jurisdiction to enter its March 8 and April 19, 2013 judgments.

Finally, the EFM argues that the trial court erred in awarding attorney fees and costs against plaintiff only, instead of plaintiff and his attorney. Statutory interpretation is a question of law that is considered de novo on appeal. *Elba Twp v Gratiot County Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013). MCL 600.2591(1) provides:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action *shall* award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party *and their attorney*. [Emphasis added.]

"Because the Legislature's use of the term 'shall' denotes that the sanctions are mandatory," trial courts do not "have discretion to forgo sanctions on the basis of an internal policy." *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996). Because MCL 600.2591(1) plainly provides that the court shall award costs and fees to the prevailing party by assessing them against the nonprevailing party *and* their attorney, the trial court erred in awarding attorney fees and costs against plaintiff only.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendants, the prevailing parties, may tax costs. MCR 7.219.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood